

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS**

ENTROPIC COMMUNICATIONS, LLC)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 2:22-cv-00125-JRG
)	
CHARTER COMMUNICATIONS, INC.)	
)	
Defendant.)	
)	

**CHARTER’S MOTION TO EXCLUDE
THE EXPERT OPINIONS OF STEPHEN DELL**

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GLOSSARY

Term	Description
CCAP	Converged Cable Access Platform
CM	Cable Modem
CMTS	Cable Modem Termination System
CPE	Customer Premise Equipment
FBC	Full Band Capture
Gigabit	Gigabits per second
Mbps or Mbit	Megabits per second
MoCA	Multimedia over Coaxial Alliance
PMA	Profile Management Application
PNM	Proactive Network Monitoring
STB	Set-Top Box
'775 patent	Asserted U.S. Patent No. 8,223,775
'008 patent	Asserted U.S. Patent No. 8,792,008
'826 patent	Asserted U.S. Patent No. 9,825,826
'362 patent	Asserted U.S. Patent No. 9,210,362
'682 patent	Asserted U.S. Patent No. 10,135,682
'690 patent	Asserted U.S. Patent No. 8,284,690

Defendant Charter Communications, Inc. (“Charter”) respectfully submits this opening brief in support of its motion to exclude the damages opinions of Stephen Dell submitted on behalf of Plaintiff Entropic Communications, LLC (“Entropic”).

I. INTRODUCTION

Entropic’s damages expert, Stephen Dell, opines that Entropic is owed no less than [REDACTED]. In arriving at this vastly inflated damages amount, Dell (i) fails to apportion for the incremental value of the asserted patents, (ii) improperly calculates damages for method claims, (iii) improperly calculates future damages by applying his running royalty through patent expiration based on unrealistic and speculative projections, (iv) opines on a “benefit share” akin to a profit split based on [REDACTED], and (v) improperly makes credibility determinations of Charter’s witnesses. Dell’s reasonable royalty opinions are fundamentally flawed and unreliable, and should be excluded in their entirety.

II. FACTUAL BACKGROUND

A. The Asserted Patents And Accused Products/Services

[REDACTED]

[REDACTED]

[REDACTED] | [REDACTED] [REDACTED]

[REDACTED]

[REDACTED]

¹ “Ex.” refers to Exhibits to the Declaration of Elizabeth Long In Support Of Charter’s Motion To Exclude The Expert Opinions Of Stephen Dell, filed herewith.

² The Asserted Patents are the ’775 patent, the ’008 patent, the ’826 patent, the ’362 patent, the ’682 patent, and the ’690 patent.

[REDACTED]

B. The Dell Reports

On July 21, 2023, Dell served an expert report opining that Entropic is entitled to damages

[REDACTED]

[REDACTED] Below is a description of each of Dell's damages theories for the asserted patents.

1. The '775 Patent

[REDACTED]

[REDACTED]

[REDACTED]

2. The '008/'826 Patents

Dell's report asserts that the claimed technology in the '008/'826 patents [REDACTED]

[REDACTED]

Dell then purports to [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

3. The '362 Patent

Dell claims, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

⁵ [REDACTED]

[REDACTED]

a. Theory 1 [Subset of '008/'826]

For this theory, Dell uses the same methodology for the '008/'826 patents described above, but instead of [REDACTED]

[REDACTED]
[REDACTED]

b. Theory 2 [REDACTED]

Dell claims that [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

c. Theory 3 [REDACTED]

As support for the claim that [REDACTED]

[REDACTED]
[REDACTED]

⁶ [REDACTED]
[REDACTED]

[REDACTED]

4. The '682 Patent

According to [REDACTED]

[REDACTED]

To calculate his reasonable royalty, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

5. The '690 Patent

Regarding the '690 patent, alleged to be infringed [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

III. LEGAL STANDARDS

An expert witness may provide opinion testimony only if “(a) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.” Fed. R. Evid. 702. Rule 702 requires the district court to act as a gatekeeper to “ensure that any and all scientific testimony or evidence admitted is not only relevant but reliable.” *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592 (1993). This “basic gatekeeping obligation” applies to all expert testimony, including damages

experts. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999); *VirnetX, Inc. v. Cisco Sys., Inc.*, 767 F.3d 1308, 1328 (Fed. Cir. 2014).

IV. ARGUMENT

A. Dell Failed To Apportion

The Federal Circuit has “repeatedly held, the essential requirement for reliability under *Daubert* is that the ultimate reasonable royalty award must be based on the incremental value that the patented invention adds to the end product. In short, apportionment.” *CSIRO v. Cisco Sys., Inc.*, 809 F.3d 1295, 1301 (Fed. Cir. 2015) (cleaned up). As established below, for each of the asserted patents, Dell failed to apportion to isolate the incremental value of the claimed invention.

The ’775 Patent and The ’362 Patent (Theory 2). Dell’s use of [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] *See, e.g., CSIRO v. Cisco Sys., Inc.*, No. 6:11-cv-343, 2014 WL 3805817, at *6–7 (E.D. Tex. July 23, 2014) (rejecting expert’s reliance on profit margins that were not specific to the accused products), *vacated on other grounds*, 809 F.3d 1295 (Fed. Cir. 2015).

For the ’775 patent, [REDACTED]

[REDACTED]

[REDACTED],

[REDACTED]

For the '362 patent, [REDACTED]

[REDACTED] Dell
“made no effort to factor out of his proffered royalty base [those] products which do not even
feature the claimed invention.” *IP Innovation L.L.C. v. Red Hat, Inc.*, 705 F. Supp. 2d 687, 690
(E.D. Tex. Mar. 2, 2010). [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]; *see*
LaserDynamics, Inc. v. Quanta Computer, Inc., 694 F.3d 51, 69 (Fed. Cir. 2012).

The '008/'826 Patents And The '362 Patent (Theory 1). Dell's first [REDACTED]

[REDACTED]

8

[REDACTED]
[REDACTED].)

[REDACTED]

Because he “failed to specify, distinguish, and then separate the value” of [REDACTED] [REDACTED] Dell’s opinions should be excluded. *See BMC Software, Inc. v. Servicenow, Inc.*, No. 2:14-CV-903-JRG, 2016 WL 379620, at *3 (E.D. Tex. Feb. 1, 2016).

[REDACTED]

[REDACTED] suffers from a “complete lack of economic analysis to quantitatively support” the allocation. *LaserDynamics*, 694 F.3d at 69. Dell’s apportionment opinions are little

10 [REDACTED]

more than *ipse dixit*, and should be excluded. *See, e.g., Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 137 (1997) (“[N]othing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert.”).

The '682 Patent And The '690 Patent. As noted above, [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] *See VirnetX, Inc.*, 767 F.3d at 1326 (“No matter what the form of royalty, a patentee must take care to seek only those damages attributable to the infringing features.”). For the '690 patent, [REDACTED]

[REDACTED]
[REDACTED]. *See, e.g., ROY-G-BIV Corp. v. ABB, Ltd.*, No. 6:11-cv-622-LD, 2014 WL 12465449, at *3 (E.D. Tex. Aug. 1, 2014) (excluding opinion on apportionment that “lack[ed] any objective or even substantial qualitative analysis to demonstrate *why* 70% is the proper apportionment”). Dell has no expertise to opine on the relative values of patents, and the fact that he discussed his [REDACTED] does not supply a reliable foundation. There is “no apparent basis for [Dell’s] conclusory approximation of a percentage value,” such as a “reference to specific portions of [the technical

expert's] technical opinion." *See Opticurrent, LLC v. Power Integrations, Inc.*, 2018 WL 6727826, at *12 (N.D. Cal. Dec. 21, 2018).

The '362 Patent (Theory 3). As noted above, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED], does not rest "on a reliable foundation,"

and should be excluded. *See Daubert*, 509 U.S. at 597–98.

B. Dell's Lump Sum Royalties Based On Infringement Of Method Claims Are Unreliable, Speculative, And Should Be Excluded

Each of the asserted claims for the '682 and '690 patents are method claims, and Entropic claims that [REDACTED]

[REDACTED]) Dell's calculation of a lump sum reasonable royalty for both patents is unreliable and speculative because [REDACTED]

[REDACTED]

[REDACTED]

First, as Dell admits, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Dell has failed to “establish that but-for infringement that has already occurred with respect to a certain product, the infringer would have paid a lump sum royalty for a license to keep selling that certain product through the life of the patent.” *Ericsson Inc. v. TCL Commc’n Tech. Holdings, Ltd.*, No. 2:15-CV-00011-RSP, 2018 WL 3089701, at *7 (E.D. Tex. Mar. 7, 2018). [REDACTED]

[REDACTED]

[REDACTED] accordingly, are nothing more than pure speculation. *See, e.g., Allergan Sales, LLC v. UCB, Inc.*, No. 2:15-cv-01001-JRG, 2016 WL 8222619, at *2 (E.D. Tex. Nov. 7, 2016) (excluding opinions of plaintiff’s damages expert “based on a running royalty applied to future acts of infringement that have not yet occurred”).

Second, Dell’s projection of royalties through patent expiration that assume no change to

[REDACTED] is unreliable

¹¹ [REDACTED]

because it ignores the dynamic nature of the cable industry. Dell cites no treatises, textbooks, or journals that support an assumption of entirely static economic outcomes (including inflation and interest rates) over the next decade. By assuming no changes to [REDACTED] in this constantly-evolving industry, Dell’s royalties for future infringement are not based on “sound economic and factual predicates” and should be excluded. *LaserDynamics*, 694 F.3d at 67.

C. Dell’s Other “Lump Sum” Royalty Opinions Are Unreliable, Speculative, And Should Be Excluded

In addition to the unreliable opinions on future infringement for the ’682 and ’690 patents, Dell also provides unreliable opinions that he characterizes as a [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Dell’s static future projections are far from the type of “realistic” projections that may be presented. *See, e.g., Ericsson*, 2018 WL 3089701, at *7; *see also Finjan, Inc. v. Sophos, Inc.*, No. 14-CV-01197-WHO, 2016 WL 4268659, at *5 (N.D. Cal. Aug. 15, 2016) (“Layne-Farrar’s estimate of steady sales through the end of 2025 and 2032, based only on current growth, is too speculative to assist the jury in assessing a reasonable future damage amount.”). In short, Dell’s opinions are “derived from unreliable data

and built on speculation,” and should not be admitted. *Power Integrations, Inc. v. Fairchild Semiconductor Int’l, Inc.*, 711 F.3d 1348, 1374 (Fed. Cir. 2013).

D. Dell’s Application Of A “Benefit Share” From ██████████ Is Unreliable And Should Be Excluded

For all of the asserted patents, Dell’s justification ██████████

██████████
██████████
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██████████

██████████. Accordingly, Dell’s split is indistinguishable from the 25% rule of thumb that has been rejected by the Federal Circuit. *Uniloc USA Inc. v. Microsoft Corp.*, 632 F.3d 1292, 1318 (Fed. Cir. 2011).

E. Dell Should Be Precluded From Making Credibility Determinations

Dell, as damages expert, should be precluded from making credibility determinations regarding Charter’s corporate representatives, particularly on technical matters for which he is entirely unqualified. (*See, e.g.*, Ex. B ¶¶ 54, 57, 66–67.) “Credibility determinations, of course, fall within the jury’s province.” *Skidmore v. Precision Printing & Pkg., Inc.*, 188 F.3d 606, 618 (5th Cir. 1999); *see also Oasis Rsch., LLC v. Adrive, LLC*, No. 4:10-CV-435, 2013 WL 12156381, at *2 (E.D. Tex. Mar. 1, 2013) (precluding expert from “testifying as to any witness’s credibility”).

V. CONCLUSION

For the foregoing reasons, Charter respectfully requests exclusion of Dell’s opinions regarding a reasonable royalty.

Dated: September 11, 2023

Respectfully submitted,

/s/ Daniel Reisner by permission Elizabeth Long

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document and all attachments thereto are being filed electronically in compliance with Local Rule CV-5(a). As such, this document is being served September 11, 2023, on all counsel of record, each of whom is deemed to have consented to electronic service. L.R. CV-5(a)(3)(A).

/s/ Elizabeth Long
Elizabeth Long

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] _____

CERTIFICATE OF CONFERENCE

Pursuant to Local Rule CV-7(h), the undersigned counsel hereby certifies that counsel for the parties met and conferred by telephone on September 1, 2023, and Plaintiff has stated that it opposes this motion.

/s/ Elizabeth Long
Elizabeth Long